Koperasi Kampung Keriam Dengan Tanggungan Bhd & Anor v Taty Tjhai (suing as the administrator of the estate of Chandrawati Tjhaim, deceased)

COURT OF APPEAL (BRUNEI DARUSSALAM) — CIVIL APPEAL NO 19 OF 2008
POWER PCA, MORTIMER AND DAVIES JJCA
23 MAY 2009

Civil Procedure — Costs — Appeal — Order for costs founded on error of law — Whether appeal against order for costs ought to be entertained — Statutory purpose behind O 22A of the Rules of the Supreme Court — Whether O 22A intended to penalise plaintiffs who refuse to accept offer to settle higher than award assessed by court — Rules of the Supreme Court O 22A

Damages (Personal injury or death) — Action for — Offer to settle — Refusal of plaintiff to accept offer to settle — Offer to settle more than award assessed by court — Whether plaintiff ought to be penalised by costs on indemnity basis — Rules of the Supreme Court O 22A

In this fatal running down action, the appellants had admitted liability. They made the respondent a settlement offer of $75,000 under O 22A of the Rules of the Supreme Court 'RSC', increased on rejection to $80,000. The registrar subsequently assessed damages at $42,932.35, which on appeal to the judge was increased by the judicial commissioner ('JC') to $70,000 with interest. The JC also ordered costs to the respondent up to the date of the offer and thereafter each party to bear its own costs. The JC had awarded costs on the basis that O 22A was not enacted to penalise plaintiffs whose legal advisers felt that on a proper assessment, there was a good chance of recovering more than the offer. The JC also appeared to have taken into account that 'it was just bad luck in the draw' that the respondent did not recover more. The appellants appealed against the order for costs.

Held, allowing the appeal with costs:

(1) Notwithstanding s 20(2)(d) of the Supreme Court Act, the Court of Appeal will not refuse to entertain an appeal where the order for costs is founded on an error of law (see para 9); *Hj Osman bin Hj Abdul Rahman v Julkifli bin Jenudin* (Civil Appeal No 2 of 2005) referred; *Donald Campbell & Co, Ltd v Pollak* [1927] All ER 1 referred.

(2) Order 22A of the RSC was enacted to ensure that plaintiffs who did not accept the amount paid should be penalised in costs. The JC was wrong to suggest that O 22A was enacted to discourage the pressing of ill advised claims and not reasonable assessments that proved to be wrong. Order 22A not only enables defendants to protect themselves in costs but also to penalise plaintiffs, however reasonable or unreasonable the advice they received may have been, who have refused to bring to an end the litigation with all its attendant costs, by accepting an offer which was more than they received (see para 12); *Findlay v Railway Executive* [1950] 2 All ER 969 referred.

(3) The JC's observations on the respondent's 'bad luck' ought not to have been a matter considered in the exercise of his discretion. His discretion ought to have been exercised by having regard to the amount actually awarded and not based upon speculation of the amount the respondent might have been awarded if she had been lucky (see para 13).

(4) The JC was wrong in law to exercise his discretion as he did and the appeal ought to be allowed. The respondent was entitled to her costs on the standard basis until the date of service of the offer. Thereafter, the appellants were entitled to their costs on an indemnity basis from the date of service of the offer (see paras 15, 17–18).

[Bahasa Malaysia summary

Dalam tindakan kemalangan yang tidak dapat dielakkan, perayu-perayu mengaku liabiliti. Mereka menawarkan kepada responden penyelesaian sebanyak $75,000 di bawah A 22A Kaedah-Kaedah Mahkamah Besar ('KMB'), ditambah atas penolakan kepada $80,000. Pendaftar kemudiannya mentaksirkan ganti rugi sebanyak $42,932.35, di mana atas rayuan kepada hakim ditambah oleh pesuruhjaya kehakiman ('PK') kepada $70,000 dengan faedah. PK juga memerintah kos kepada responden sehingga tarikh tawaran dan selepas itu setiap pihak menanggung kosnya sendiri. PK mengawardkan kos atas dasar bahawa A 22 tidak digubal untuk mendenda plaintif-plaintif di mana penasihat undang-undangnya berpendapat bahawa atas taksiran yang betul, terdapat peluang yang baik untuk mendapatkan kembali bayaran lebih daripada tawaran tersebut. PK juga jelas telah mengambilkira 'it was just bad luck in the draw' bahawa responden tidak mendapatkan kembali bayaran lebih. Perayu-perayu merayu terhadap perintah untuk kos.

Diputuskan, membenarkan rayuan dengan kos:

(1) Walaupun terdapat s 20(2)(d) Akta Mahkamah Besar, Mahkamah Rayuan tidak akan menolak untuk mendengar rayuan di mana perintah untuk kos adalah berdasarkan kesilapan undang-undang (lihat perenggan 9); *Hj Osman bin Hj Abdul Rahman v Julkifli bin Jenudin* (Civil Appeal No 2 of 2005) diikut; *Donald Campbell & Co Ltd v Pollak* [1927] All ER 1 dirujuk.

(2) Aturan 22A KMB digubal untuk memastikan bahawa plaintif-plaintif yang tidak menerima jumlah yang dibayar patut didenda dengan kos. PK tersilap apabila menyatakan bahawa A 22A digubal untuk mengurangkan tekanan tuntutan-tuntutan tidak bijak dan taksiran yang tidak munasabah yang dibuktikan salah. Aturan 22A bukan sahaja membolehkan defendan-defendan melindungi diri mereka terhadap kos tetapi juga untuk mendenda plaintif-plaintif, walau bagaimana munasabah ataupun tidak nasihat yang diterima, yang menolak untuk menamatkan litigasi dengan kesemua kos yang mengiringinya, dengan menerima tawaran yang lebih daripada yang diterima oleh mereka (lihat perenggan 12); *Findlay v Railway Executive* [1950] 2 All ER 969 diikut.

(3) Pemerhatian PK atas 'bad luck' responden tidak patut menjadi perkara yang dipertimbangkan di dalam melaksanakan budi bicaranya. Budi bicaranya patut dilaksanakan dengan mengambilkira jumlah yang sebenarnya diawardkan dan bukan berdasarkan kepada spekulasi jumlah yang mungkin diawardkan kepada responden jika dia bernasib baik (lihat perenggan 13).

(4) PK salah dari segi undang-undang dalam melaksanakan budi bicaranya seperti yang dilakukannya dan rayuan tersebut sepatutnya dibenarkan. Responden berhak kepada kosnya atas dasar standard sehingga tarikh penyerahan tawaran tersebut. Perayu-perayu selanjutnya berhak kepada kos-kos mereka atas dasar indemniti dari tarikh penyerahan tawaran tersebut (lihat perenggan 15, 17–18).]

Notes

For cases on action for damages (personal injury or death) generally, see 6 *Mallal's Digest* (4th Ed, 2009 Reissue) paras 340–368.

For cases on appeal, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1876–1887.

Cases referred to

Donald Campbell & Co, Ltd v Pollak [1927] All ER Rep 1, HL (refd)

Findlay v Railway Executive [1950] 2 All ER 969, CA (refd)

Hj Osman bin Hj Abdul Rahman v Julkifli bin Jenudin (Civil Appeal No 2 of 2005), CA (refd)

Jones v McKie and another [1964] 1 WLR 960, CA (refd)

Legislation referred to

Rules of the Supreme Court (Cap 5) [BR] O 22, O 22A, O 22A r 9(3)

Supreme Court Act (Cap 5) [BR] s 20, 20(2)(d)

Melissa Ang (CCW Partnership) for the appellants.

Adrian Chan (Veerasamy Associates) for the respondent.

Power PCA:

[1] In this matter Taty Tjhai, the respondent in this appeal was the plaintiff in an action she brought as the administrator of the estate of her deceased sister, Chandrawati Tjhai, who died after having been struck by a truck owned by the appellants on 23 August 2005. The appellants admitted liability and on 20 April 2007 made a settlement offer of $75,000 under O 22A of the Rules of the Supreme Court. This offer was not accepted and on 1 October 2007 the offer was increased to $80,000. The assessment of damages was heard by acting senior registrar Norismayanti who on 19 February 2008 awarded damages of $42,932.35. This award was appealed to judicial commissioner Findlay who allowed the appeal and increased the damages to $62,742.35 which with interest made a total award of about $70,000. Findlay JC ordered that the appellant, the respondent in this appeal, be entitled to the costs up to the date of the offer and that thereafter each party should bear its own costs including the costs of that hearing.

[2] He set out his reasons for so doing as follows:

> There remains Mr Chan's argument that I should exercise my discretion in this matter by not awarding costs against the appellant. As Mr Chan points out, and as I emphasised in my judgment, there is no certain method of assessing damages in cases such as this. It is essentially a matter of educated guesswork and an award may vary considerably case by case and judge by judge. I indicated in my judgment that I might well have awarded somewhat more in respect of pain and suffering and another judge might well have awarded more under the claim for dependency.
>
> Order 22A is a provision designed to encourage settlements. It is not there, in my view, to penalise plaintiffs who have advisers who reasonably feel that, on a proper assessment of the matter, their clients have a good chance of recovering an award more than the offer made. The provisions are meant to discourage the pressing of ill advised claims, not reasonable assessments that proved to be wrong only with the benefit of hindsight.
>
> I put to Mr Chan that I should approach this matter by considering whether or not the appellant's decision to reject the offer was reasonable. He agreed that this was the proper approach and Ms Ang also accepted that this was right.
>
> In my judgment, the appellant did not act unreasonably in rejecting the offer of $80,000. Having regard to the cases cited by Mr Chan, there were entirely reasonable grounds for believing that the appellant could recover a sum in excess of $80,000. The fact that the appellant did not do so, but recovered only $70,000, was, it might be said, just bad luck in the draw. I do not think that the appellant should be greatly penalised because of this. However, I think it would be just to give recognition to the fact that the respondent's conduct in making the offer was also not unreasonable. It was, in my view, a fair offer.

[3] There is now an appeal to this court against that costs order. A

[4] The first hurdle faced by Ms Melissa Ang, who appears for the appellants, arises because of s 20 of the Supreme Court Act which provides:

> 20(1) Subject to subsection (2), an appeal should be as of right to the Court of Appeal from every judgment or order of the High Court in a civil cause or matter. B
>
> (2) No appeal shall lie —
>
> (d) from any order relating only to costs. C

[5] This is such an appeal however the effect of that section has been tempered by a judgment of this court, *Hj Osman bin Hj Abdul Rahman v Julkifli bin Jenudin* (Civil Appeal No 2 of 2005), which involved s 20(2)(d). It was an appeal to this court from a decision in the High Court awarding a successful defendant only half of his costs of the appeal from the decision of a registrar to the High Court. Reliance was placed by the Court of Appeal on the following passage from the speech of Viscount Cave in *Donald Campbell & Co, Ltd v Pollak* [1927] All ER Rep 1 at p 5: D E

> If the authorities are carefully examined, I think it will appear that there is no rule of the House which prevents a party from asking to have a decision reviewed on the ground that it is wrong in law, even though the only result of a reversal of the decision would be to alter the incidence of cost. In my opinion, the true rule is that, while this House will not review an exercise of discretion as to costs, *it will not refuse to entertain an argument that an order as to costs is founded on an error of law*. (Emphasis added.) F

[6] The Court of Appeal held: G

> That the order for costs was indeed, as Viscount Cave put it, *founded on an error of law*, in that the judge appeared to accept as a settled rule, that where a person brings proceedings to recover damages, and does in fact do so, albeit not to the extent claimed, he is entitled nevertheless to recover all his costs of the proceedings. (Emphasis added.) H

[7] Order 22A is in the following terms:

> Costs (O 22A r 9) I
>
> 9(3) Where an offer to settle made by a defendant —
>
> (a) ...
>
> (b) is not accepted by the plaintiff, and the plaintiff obtains judgment not more favourable than the terms of the offer to settle.

A The plaintiff is entitled to costs on the standard basis to the date the offer was served and the defendant is entitled to costs on the indemnity basis from that date, unless the Court orders otherwise.

B **[8]** In the present case Findlay JC exercised his discretion to award costs on the basis that O 22A was not enacted to 'penalise plaintiffs' whose advisers 'reasonably feel that on a proper assessment' there is a good chance of recovering more than the offer. He also seems to have taken into account that it 'was just bad luck in the draw' that the respondent did not recover more.

C **[9]** What we must decide is whether these are matters which could properly be taken into account in the exercise of discretion. If that be not so then the decision was founded on an error of law and this court must quash the order of the judge and exercise its own discretion.

D **[10]** Mr Chan for the respondent relies upon the following passage from the judgment of Lord Willmer in *Jones v McKie and another* [1964] 1 WLR 960 at p 966:

E But when a judge, deliberately intending to exercise his discretionary powers, has acted on facts connected with or leading up to the litigation *which have been proved before him or which he has himself observed during the progress of the case*, then it seems to me that a Court of Appeal, although it may deem his reasons insufficient and may disagree with his conclusion, is prohibited by the statute from entertaining an appeal from it. (Emphasis added.)

F What it comes to, I think, is that, in order to justify an appeal as to costs only, this court must be able to say that the judge in the court below, however much he may have been purporting to exercise his discretion, has not really exercised his discretion at all. This court can say that, but can say it only, as I see it, if it is satisfied that the judge in the court below has taken into consideration wholly extraneous and irrelevant matters.

G

[11] He submits that the judicial commissioner took into account 'facts connected with' the litigation when observing that O 22A was not enacted to
H penalise a plaintiff who had acted upon what was, on its face, sound advice and that it was 'bad luck of the draw' that she was not awarded more than the amount paid in.

I **[12]** We cannot agree that either was a proper matter for consideration in the exercise of the judge's discretion. Order 22A was made to ensure that plaintiffs who did not accept the amount paid should be penalised in costs. It is quite wrong to suggest that it was made to discourage the pressing of ill advised claims and not reasonable assessments that prove to be wrong. The fact of the matter is that it arises not only to enable defendants to protect

themselves in costs but also to penalise plaintiffs, however reasonable or unreasonable the advice they received may have been, who have refused to bring to an end the litigation, with all its attendant costs, by accepting an offer which, in the outcome, was more than they received. The proper approach was succinctly put by Lord Denning in *Findlay v Railway Executive* [1950] 2 All ER 969 at p 972 as follows:

> The hardship on the plaintiff in the instant case has to be weighed against the disadvantages which would ensue if the plaintiff generally who have been offered reasonable compensation were allowed to go to trial and run up costs with impunity. The public good is better secured by allowing the plaintiff to go on to trial at their own risk generally as to costs. That is the basis of the rules as to payment into court, and I think we should implement them here, even though it means that the plaintiff has to pay out much of her damages in costs to the defendants. The only issue in the case was the amount of damages. The defendants paid a reasonable sum into court. The plaintiff took her chance of getting more, and, having failed, she must pay the costs.

[13] We turn to the statement that it was the respondent's 'bad luck' not to have got more. This was clearly, we are satisfied, not a matter which could be properly weighed in the exercise of discretion. The discretion must be exercised by having regard to the amount actually awarded and not based upon speculation of the amount the litigant, might have been awarded if she had been lucky.

[14] Mr Chan finally relies upon the concluding words of O 22A r 9(3) which set out the order to be made 'unless the court orders otherwise'. He submits that the court is empowered to order otherwise and that it has done so in the present case. The answer to this need hardly be stated. The order otherwise in the present case was a wrongful exercise of discretion and cannot stand. Indeed the discretion to order otherwise is limited only to an order that the costs be on a standard or indemnity basis and there nothing in the present case that would warrant an order otherwise than on an indemnity basis.

[15] We are satisfied that the judicial commissioner was wrong in law to exercise his discretion as he did and that an appeal does, therefore, lie against his decision.

[16] There is nothing that would warrant a departure from the terms of O 22.

[17] The appeal must be allowed.

[18] We make the following order nisi as to costs. The respondent is entitled to her costs on the standard basis until the date of service of the offer. The appellants are entitled to their costs on an indemnity basis from that date.

[19] This order will become absolute unless application is made before 9am on Thursday 4 June.

Appeal allowed with costs.

Reported by Andrew Christopher Simon